Voir dire: It's Not Just What's Asked, But Who's Asking and How[1]

David Court
Civilian Defense Counsel

Voir dire is the first opportunity counsel may have to address the individuals who decide the fate of their clients. Counsel, however, have no right to conduct their own voir dire: "The military judge *may* permit the parties to conduct the examination of members or *may* personally conduct the examination."[2] The purpose of this note is to convince military judges to permit counsel-conducted voir dire, both general and individual, and to encourage all advocates, whether prosecution or defense, to use this opportunity. This note does not justify the process of voir dire—its place in the courts-martial practice seems beyond question. "[F]ew experienced trial advocates would doubt the importance of *voir dire*."[3]

Voir dire has several judicially recognized purposes: (1) to ensure impartiality; (2) to educate the panel about the facts and the law in the case; (3) to develop rapport with the members; and (4) to determine how to exercise challenges, both causal and peremptory.[4] Either the military judge or counsel may address these purposes. Advocates must be intimately familiar with the facts of their cases to address some of these recognized purposes, but only a courageous (and foolish) counsel would attempt to "indoctrinate"[5] a panel on the law, as that is clearly the military judge's function.[6]

The *Military Judges' Benchbook* (*Benchbook*), *DA Pamphlet 27-9*, lists twenty-eight questions that the military judge may use in voir dire.[7] Nine of these twenty-eight questions (two of which are potential follow-up questions) address the issue of impartiality, five in the context of sentencing; nine (two of which are potential follow-up questions) are related to the members' backgrounds and life experiences, which also relate to impartiality.[8] The final six questions teach the members about the law. Four of these concern reasonable doubt; and one question each concerns the burden of proof and credibility of witnesses.[9] None of these twenty-eight generic questions are designed to educate a panel about the facts of a case, nor are they designed to develop rapport with the members.[10] When the military judge asks these questions, it would be inappropriate for him to attempt to develop a rapport with the members because he later must instruct them to "disregard any comment or statement or expression made by [the military judge] during the course of the trial that might seem to indicate any opinion on [the military judge's] part."[11]

An advocate who asks focused questions can center the panel's attention much more effectively than the *Benchbook's* voir dire questions. Thus, there is a role for counsel-conducted general voir dire. Some military judges, however, may believe the following: (1) counsel-conducted voir dire wastes time;[12] (2) counsel do not know how to conduct voir dire well, or do not know how to develop causal challenges;[13] (3) counsel embarrass themselves or panel members with thoughtless or inartfully worded questions;[14] and (4) because most federal

---

1. This article reflects the substance of the author's comments at the 2003 Interservice Military Judges' Seminar, Maxwell Air Force Base, Alabama (Apr. 22, 2003).

2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(d) (2002) [hereinafter MCM] (emphasis added).

3. United States v. Holt, 33 M.J. 400, 411 (C.M.A. 1991).

4. United States v. Jefferson, 44 M.J. 312, 318 (1996).

5. *Id*.

6. *See* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK ch. 2, § V, para. 2-5 (15 Sept. 2002) [hereinafter BENCHBOOK].

7. *Id.* para. 2-5-1.

8. *Id.*

9. *Id.*

10. *See id.*

11. *Id.* para. 2-5-12.

12. *See* United States v. Jefferson, 44 M.J. 312, 318 (1996).

13. *See* United States v. Holt, 33 M.J. 400, 411 (C.M.A. 1991).

14. *Cf.* Leonard B. Sand & Steven Alan Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423 (1985) (concluding that it is better for judges to conduct their own voir dire; based on an experiment in the U.S. Court of Appeals for the Second Circuit).

(Article III) courts do not allow counsel-conducted voir dire,[15] military judges should not either.

First, requiring counsel to submit written voir dire questions to military judges before trial enables counsel to revise improperly worded questions and helps eliminate the perception that voir dire may waste time. The military judge, at either a Rule for Courts-Martial (RCM) 802 or Article 39a session, can review the questions to determine their validity.[16] Military courts have expressly approved this procedure,[17] with the caveat that "the denial [at trial] of otherwise proper questions only because they had not been previously proffered is unduly restrictive and an abuse of discretion."[18] Second, this procedure also allows the military judge to mentor an eager counsel whose questions are inappropriate, saving the counsel and the panel embarrassment at trial. Since much personal and professional information about the panel members should be available through member questionnaires before voir dire,[19] counsel should limit background questions to case-specific information. Generally, military judges will not have previous knowledge of any case-specific facts. Therefore, the advocates may be best suited to articulate information to the military judge why a question is necessary, or explain it to the panel if they misunderstand the question.

Third, by mentoring counsel to conduct effective voir dire, military judges improve the system. If experienced military judges exercise the discretion to deny young counsel adequate voir dire opportunities because counsel do not conduct it well, how will young advocates ever learn to become experienced trial advocates, such as the one praised in *United States v. Holt*?[20] While RCM 912(f)(1)(A)-(N) clearly lists some of the common bases for challenges for cause, subparagraph (N) is broad enough to allow relevant inquiries beyond the generic questions in the *Benchbook*.[21] Consequently, counsel should be able to articulate the relevance of their proposed questions at RCM 802 or Article 39a sessions. If practice makes perfect, then providing young counsel with voir dire opportunities is one good way to cure imperfection.

Finally, the Article III or federal court argument disregards the unique nature and genesis of courts-martial. The panel-selecting convening authority has no parallel in Article III courts.[22] Both advocates and jurists have referred to the military panel as a "blue ribbon panel."[23] The convening authority, however, has already screened the panel based upon criteria that include "education, training, experience, . . . and judicial temperament."[24] Perhaps in recognition of this pre-screening for qualified members, trial and defense counsel are each only entitled to one peremptory challenge.[25] These differences significantly weaken any attempt to integrate Article III voir dire practice into military courts-martial. Moreover, the argument that courts-martial should reflect Article III courts ignores the very real concern that the public perception of the court-martial process is crucial to its continued acceptance, and even its very existence.[26]

What, then, are reasons for permitting counsel-conducted general voir dire? In *United States v. Jefferson*, the court cites building rapport with the panel as one important reason.[27] Each counsel is presenting evidence and proposing an analysis of that evidence to either prove or discredit an allegation. Each advocate's credibility may be as important to the panel members' decision-making process as the facts themselves. It is often

15. *See id.*

16. *See* MCM, *supra* note 2, R.C.M. 802-803.

17. *See* United States v. Dewrell, 55 M.J. 131 (2001); United States v. Torres, 25 M.J. 555 (A.C.M.R. 1987), *pet. denied*, 27 M.J. 466 (C.M.A. 1988); United States v. Slubowski, 7 M.J. 461 (C.M.A. 1979), *pet. denied*, 9 M.J. 264 (C.M.A. 1980).

18. *Torres*, 25 M.J. at 557.

19. *See* MCM, *supra* note 2, R.C.M. 912(a)(1).

20. 33 M.J. 400, 411 (C.M.A. 1991) (emphasizing "the importance of . . . *voir dire* in uncovering possible latent blind spots and in preparing the members" for the case).

21. MCM, *supra* note 2, R.C.M. 912(f)(1)(A)-(N) (noting that a member who is not free of bias "should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality").

22. UCMJ art. 25 (2002); MCM, *supra* note 2, R.C.M. 502(a)(1).

23. United States v. Wiesen, 56 M.J. 172, 180 (2001) (Crawford, C.J., dissenting); United States v. Rome, 47 M.J. 467, 471 (1998) (Crawford, J., dissenting); United States v. Youngblood, 47 M.J. 338, 346 (1997) (Crawford, J., dissenting).

24. UCMJ art. 25(d)(2).

25. MCM, *supra* note 2, R.C.M. 912(g).

26. *See, e.g.*, United States v. Dinatale, 44 M.J. 325 (1996).

27. United States v. Jefferson, 44 M.J. 312, 318 (1996).

said that it is not what one says but how one says it that counts. There is, of course, a fine line between establishing a professional rapport with panel members and attempting to use the power of personality to verbally seduce or hypnotize them. This fear, however, is more likely to occur in an Article III court than in a court-martial, given the "blue ribbon" nature of the panel.[28]

Another reason to permit voir dire is that it assists counsel in determining whether members are impartial. Equally as important as the answers are the responding members' body language, visible comfort with the questions, and their apparent degree of candor. Peremptory challenges are necessarily based on such subtle cues, consistent with *Jefferson*'s observation that voir dire "is also used by counsel as a means of . . . determining how to exercise peremptory challenges."[29]

Next, educating panel members about a case is another reason justifying the use of counsel-conducted voir dire in courts-martial. Only an advocate can know what facts to use to educate or question the panel. For example, the military judge will not know if alcohol plays a role in a case unless it is part of the charged offense. On the other hand, a knowledgable counsel will know enough to question whether panel members abstain from using alcohol, or view its use as a moral issue. Although the military judge will ask a generic question about panel members and alcohol consumption if a counsel requests it, only counsel will know how far to go to "uncover . . . possible latent blind spots."[30] Failure to provide for any follow-up questions during general voir dire, requiring the counsel to wait for individual voir dire instead, could well be a waste of time.

There are also areas appropriate for general voir dire questioning, independent of evidentiary considerations, which should only come from an advocate. For example, in a case of beating a child with an electrical cord, a defense counsel might display the weapon to the panel to see if there are any noticeable reactions.[31] In a case with an immunized witness, a prosecutor might explore the panel members' reactions to the use of informants. In another case, the defense counsel might ask about the theory of alibi to learn if panel members have a visceral dislike for the word. The prosecution may wish to learn if panel members can grasp the concepts of principal or co-conspirator as they apply to the case.

Finally, public perception of the military justice system is logically connected to counsel-conducted voir dire from colonial times. As Judge Crawford observed in *Jefferson*, a reason for voir dire was that "[d]uring British rule, the Americans were concerned that in trials of political opponents the Crown may attempt to stack the jury in its favor."[32] What impression will the current American public have if the counsel for an accused who is ordered to trial by the same commander who also selects the panel, is prohibited from even questioning those members to determine their fitness to sit in judgment?

It is clearly within the military judge's discretion to permit or deny counsel-conducted general voir dire because neither the trial nor the defense counsel has a statutory right to conduct it. It seems unfair, at the very least, absent a sound, rational, and articulable basis, to deny counsel this trial tool. If military courts-martial are to continue as fair fora to adjudicate the culpability of American service members, perhaps there should be more acknowledgment of the observation that former Supreme Court Justice Potter Stewart made: "Fairness is what justice really is."[33]

---

28. *See Wiesen*, 56 M.J. at 180; *Rome*, 47 M.J. at 471; *Youngblood*, 47 M.J. at 346.

29. *Id.*

30. United States v. Holt, 33 M.J. 400, 411 (C.M.A. 1991).

31. *Id.*

32. *Jefferson*, 44 M.J. at 317.

33. DAVID SHRAGER & ELIZABETH FROST, THE QUOTABLE LAWYER 158 (1986) (quoting U.S. Supreme Court Justice Potter Stewart).